

General Baptist Nursing Home, Inc. and Meat Cutters Local Union No. 88, United Food & Commercial Workers, AFL-CIO/CLC. Case 14-CA-14735

January 7, 1982

DECISION AND ORDER

**BY MEMBERS FANNING, JENKINS, AND
HUNTER**

On September 4, 1981, Administrative Law Judge John C. Miller issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,¹ and conclusions² of the Administrative Law Judge and to adopt his recommended Order,³ as modified herein.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, General Baptist Nursing Home, Inc., Campbell, Missouri, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Insert the following as paragraph 1(b) and re-letter the subsequent paragraphs accordingly:

"(b) Altering employees' work schedules because of employees' union activities or support for a union or because of their protected concerted activities."

¹ Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings. We also find no merit to Respondent's assertions that the Administrative Law Judge's findings are irreconcilable and that the case should be remanded for a rehearing by another administrative law judge.

² In the absence of exceptions, we find it unnecessary to consider the Administrative Law Judge's finding on the supervisory status of Licensed Practical Nurses Farmer and Romaine, and whether Nursing Home Administrator Britt and Director of Nursing Cunningham unlawfully had requested them to keep Respondent informed about the union activity of other employees.

³ In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

2. Substitute the attached notice for that of the Administrative Law Judge.

IT IS FURTHER ORDERED that all other allegations not found violative of the Act are hereby dismissed.

APPENDIX

**NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government**

WE WILL NOT constructively discharge or refuse to reinstate an employee where such action is promoted by the employee's engaging in union activities or other protected concerted activities.

WE WILL NOT alter employees' work schedules because of employees' union activities or support for a union or because of their protected concerted activities.

WE WILL NOT ask employees to surveil employees work performances and furnish us with grounds for terminating employees who are active on behalf of or who support a union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed by Section 7 of the Act.

WE WILL make a valid offer of reinstatement to Esther Fox to her former or substantially equivalent position and work schedule and make her whole for any loss of earnings she incurred as a result of her constructive discharge and/or our refusal to reinstate her, with interest, less any interim earnings.

**GENERAL BAPTIST NURSING HOME,
INC.**

DECISION

STATEMENT OF THE CASE

JOHN C. MILLER, Administrative Law Judge: This case was heard before me in St. Louis, Missouri, on May 11, 1981. The complaint, as amended, alleges, *inter alia*, that the administrator of the nursing home, Wanda Britt, interrogated employees about union organizational activity at Respondent's facility and that Director of Nursing Louise Cunningham requested that an employee assist Respondent in finding pretextual grounds to discharge an employee because said employee was supporting the Union and its organizational activities. It further alleges that on or about December 15, 1980, Respondent changed the work schedule of employee Esther Fox and thereby caused her constructive discharge and thereafter

refused to reinstate her. The complaint alleges that the above conduct was violative of Section 8(a)(3) and (1) of the National Labor Relations Act, as amended, herein called the Act.

On the entire record in this case, including the briefs of the parties and my observation of the witnesses and their demeanor, I make the following findings

FINDINGS OF FACT

I. JURISDICTION

It is alleged and admitted¹ that Respondent during the 12-month period ending February 28, 1981, derived gross revenues in excess of \$100,000 from the operation of its Campbell, Missouri, facility and that it purchased and caused to be transported to such facility goods and materials valued in excess of \$50,000 which were transported to its facility in Campbell, Missouri, from points located outside the State of Missouri. On the above undisputed facts, I find that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

It is further alleged and admitted, and I find, that Meatcutters Local Union No. 88, United Food & Commercial Workers, AFL-CIO/CLC, is at all times material a labor organization within the meaning of Section 2(5) of the Act.

II. THE UNFAIR LABOR PRACTICE ALLEGATIONS

A. 8(a)(1) Allegations

1. It is alleged that Wanda Britt, administrator of the nursing home, interrogated employees about the Union's organizational drive in telephone calls on or about December 8, 1980.

Dana Farmer, a former employee of Respondent from August 1979 through April 10, 1981, testified that she was employed as a licensed practical nurse (LPN hereafter) and in that position monitored and oversaw patient care. She testified credibly that on December 9, 1980, she stopped to pick up her children at a fellow employee's home and learned that one of the women, also employed at the nursing home, had gone to a meeting. When she inquired if it involved the Union, the husband of one of the women present did not respond but merely grinned. Ultimately, Dana Farmer said she later learned that Esther Fox had picked up a fellow employee, and that they had gone to Malden for a union meeting. After several telephone conversations with Louise Cunningham, director of nursing, about this unusual activity among the nurses aides, Farmer and another LPN, Terry Romaine, were informed by Cunningham that Britt had been informed and to let her (Cunningham) know if they found out anything else.

That same evening, Farmer and Romaine, called Britt directly and asked her what they should do, that they did not want a union. At that point, Britt merely advised them to tell her if anything else developed, and that LPNs would not be in the unit. The testimony estab-

lished that Dana Farmer and Terry Romaine called Britt and informed her of the union activities of other employees. I find, therefore, that the information was voluntarily given by Farmer and Romaine and was not derived from by interrogation on the part of Britt. While Britt did ask them to keep her advised of developments I find it insufficient to support a finding of interrogation. Accordingly, absent other evidence of interrogation, I recommend that the allegation that Britt unlawfully interrogated employees about union activities be dismissed.²

However, the evidence as to the supervisory status of LPNs discloses that, at Respondent's facility, LPNs served as charge nurses. They worked 12-hour shifts and monitored the work of some 15 people composed of nurses aides and orderlies. The complement of LPNs consisted of five full-time LPNs and one part-timer. The only registered nurse in the home was the director of nursing who worked an 8-hour shift. Consequently, for 16 hours a day, the LPN there was the only authority in charge. The LPNs had the authority to reprimand nurses aides and orderlies, orally and in writing, which could result in their ultimate discharge. The General Counsel contends that the LPNs here are employees and cites *Shadecrest Health Care Center*, 228 NLRB 1081 (1977), *Sunset Nursing Home, Inc., d/b/a North Miami Convalescent Home*, 224 NLRB 1271 (1976), and *Pinecrest Convalescent Home, Inc.*, 222 NLRB 13 (1976), as authority. While I personally disagree with the Board's findings in those cases, I am bound by Board precedent. While I find it unnecessary to make a finding here in view of my dismissal of the allegation involving alleged interrogation of Farmer by Britt, the record here is similar to the cases cited. In the event Board disposition of this case may require such a finding, I would find the LPNs here employees based on the above-cited precedent.

2. It is alleged that Louise Cunningham, director of nursing, on or about December 10, 1980, requested that an employee assist Respondent in finding grounds to discharge an employee believed to be supporting the Union by reporting deficiencies in work performance which would constitute a pretext for discharge.

Dana Farmer credibly testified that around 8 p.m. on December 10, 1980, Cunningham called her and advised Farmer that Administrator Britt was going to get rid of Fox the next day because Fox was a "troublemaker." Cunningham then asked Farmer if she knew of anything Respondent could get on Fox. Farmer replied that Fox was doing her job, but her attitude was not perfect. Cunningham responded that Respondent would have had something if it could have proven that Fox was taking too long for lunch or for her breaks. Cunningham did not specifically deny Farmer's testimony.³ I find that, irrespective of whether Farmer be deemed a supervisor or an employee, Cunningham's request was discriminatorily motivated because it was an effort to develop a pretextual reason to discharge Fox. Cunningham's conduct constitutes a violation of Section 8(a)(1) of the Act.

² The consent election agreement permitted LPNs to vote subject to challenge.

³ To the extent Cunningham's testimony conflicts with that of Farmer, I do not credit it.

¹ Respondent entered into a Stipulation for Certification Upon Consent Election (G.C. Exh. 8), which sets forth stipulated facts on commerce.

3. It is alleged that sometime in January 1981 Administrator Wanda Britt asked an employee to watch another employee believed to be supportive of the Union and to report on the activities of such employee.

Theresa Romaine testified that sometime in January 1981 Britt asked her to keep an eye on Ruby Snider's job performance. In a previous conversation with Cunningham, in early December 1980 Farmer had identified Ruby Snider as one of the nurses aides attending a union meeting. Such information in turn had been reported to Britt by Cunningham. There is no evidence indicating that there were any complaints about her work until she became interested in union representation and attended union meetings. Accordingly, this surveillance of her work performance was prompted solely by her union activities. I find that the requested surveillance of Snider's work was discriminatorily motivated and is violative of Section 8(a)(1) of the Act.

B. 8(a)(3) Allegations

It is alleged that on or about December 15, 1980, Respondent advised employee Esther Fox of a change in her work schedule thereby causing her termination and that, thereafter, Respondent refused and failed to reinstate Esther Fox to her former or substantially equivalent position, and that all such actions were caused by Esther Fox's union or protected concerted activities.

Esther Fox, alleged discriminatee herein, credibly testified that, in October 1980, she contacted one Una Moore, a union steward of Local 88, Meatcutters, and asked about getting a union into her place of employment. Later in October 1980, she met Bill Blassie, representative of the Meatcutters Local. On November 11, she attended another union meeting with Bill Blassie. In early December, specifically December 8, 1980, she and other employees of Respondent went to another union meeting in the town of Malden. On December 15, 1980, Fox was called into the office of Carolyn Stuart, who had become the director of nursing after December 12, 1980. In her office Fox met with Wanda Britt, the administrator of the nursing home, and Stuart, at which time Britt announced that there was going to be a change in Fox's work schedule and that she would rotate shifts like other nurses aides. Prior to this meeting and with the exception of a 6- to 8- week period in 1980, Fox had served in the job classification of bath nurse. Instead of working 8 a.m. to 4:30 p.m., as in the past, she would be on a schedule of 7 a.m. to 3 p.m. and thereafter would be rotated along with other nurses aides into the position of bath nurse. Fox became upset and announced that it was difficult for her to get to work for the earlier shift and said that she would have to resign. Britt advised her to think about it, telling her that Respondent would hate to lose her. At that time, Fox went ahead and wrote a letter of resignation. As her reason for rejecting the new schedule, Fox testified that, although her family had two cars, there were two other women plus her son that rode with her and that changing that shift would affect her carpool and possibly her ability to get any transportation to work. The following day, Fox had another conversation with Wanda Britt and requested that she be permitted to withdraw her resignation, Britt responded that she

would have to think it over, noting that Fox had already resigned and that she had a bad record. Ultimately, Britt rejected Fox's request to withdraw her resignation. Fox continued to work until the end of December 1980 when she was terminated.

With respect to Fox, Farmer testified credibly that she had two conversations with Cunningham on December 10, 1980, and in the first conversation she gave Cunningham additional details about 10 people who went to the union meeting. In the process, she listed some of the names, including that of Esther Fox, Ruby Snider, Agnes Jones, and Jeanie Coleman who attended the meeting, but she did not know the names of others who attended. About half an hour later the same night, Cunningham called Farmer and informed her that Britt was going to get rid of Fox the next day because she was a "troublemaker." Cunningham told Farmer not to let anyone know that Britt knew about the Union or the Union's activities. On December 11, 1980, Farmer called Cunningham and asked what happened with Esther Fox. Cunningham replied that Britt had talked to her attorney who told Britt that she should not fire Fox because she could get in trouble with the Union. Cunningham then stated, "You ought to see the job description I have made out for Esther. It will be hard on her." On December 12, 1980, Farmer approached Cunningham and asked if Cunningham had given Fox her job description. Cunningham stated that Fox had been sick that day and that Britt and Carolyn Stewart, the new director of nursing, would present it to Fox on Monday, December 15, 1980.

The evidence is undisputed that Cunningham and Britt were aware of Fox's union activities and that, whether or not they were aware that she was the prime instigator, they were aware that she had picked up a fellow employee to attend a union meeting. The evidence is also undisputed that when Fox had been off in June 1980, for an operation, Fox was assigned nurses aide duties for a while because she could not perform the bath nurse's functions which included lifting patients. At that time Fox informed Cunningham that this change in hours (from 8 a.m. to 4:30 p.m. to 7 a.m. to 3 p.m.) caused her transportation problems. Added to this is the testimony of Farmer, which I credit, that after learning that Fox was involved in a union meeting Cunningham reported that fact to Britt who stated that Fox was a troublemaker and would be terminated.

Viewed in this context, and in light of its timing, I find that the change in Fox's hours was motivated by a desire to make it difficult for Fox to continue working and force Fox to quit her job. Fox did resign as a result of this change in work schedule. The following day Fox attempted to retract her resignation and Britt refused saying that Fox had already quit and that she had a bad record. Fox denied Britt's accusation, stating that her evaluations were always good.

I have reviewed the treatment afforded Doris Foster, another employee whom Respondent took back as a part-time employee, after she left full-time employment as a nurses aide with a 1 day's oral notice. Respondent, through Stewart, its director of nursing, went out of her way to inform Foster when she could take an examina-

tion to better qualify herself for employment. The treatment afforded Foster contrasts starkly with the treatment of Esther Fox, who was not permitted to retract her resignation. I find that Respondent's change in Fox's work schedule was discriminatorily motivated with an intent to make it difficult for Fox to retain her job. I find that her resignation was forced and I find it to be a constructive discharge. I further find that Respondent's refusal to permit Fox to withdraw her resignation was also discriminatorily motivated. Both the constructive discharge and the refusal to permit her to withdraw her resignation I find violative of Section 8(a)(3) and (1) of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Charging Party, Meatcutters Local Union No. 88, United Food & Commercial Workers, AFL-CIO/CLC, is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent by Director of Nursing Louise Cunningham violated Section 8(a)(1) of the Act by requesting, for discriminatory reasons, that Dana Farmer assist Cunningham in finding some reason or pretext for discharging Esther Fox.
4. Respondent, by Administrator Wanda Britt violated Section 8(a)(1) of the Act by asking Theresa Romaine, for discriminatory reasons to keep an eye on the job performance of Ruby Snider and to report on said performance.
5. By changing the work schedule of Esther Fox and forcing her resignation and thereafter refusing to permit Fox to withdraw her resignation, all because of Fox's union or protected concerted activities, Respondent has violated Section 8(a)(3) and (1) of the Act.
6. Except as found herein, all other allegations of the complaint are dismissed.
7. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find it necessary to order Respondent to cease and desist therefrom and to take certain affirmative action designed to effectuate the purposes of the Act.

Respondent shall make an offer of reinstatement to Esther Fox to her former job and work schedule or, if such job no longer exists, to a substantially equivalent job, without prejudice to her seniority or other rights and privileges, and make her whole for any loss of earnings she may have suffered by reason of the discrimination against her. Such backpay shall be computed on a quarterly basis, with interest therein to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).⁴

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER⁵

The Respondent, General Baptist Nursing Home, Inc., Campbell, Missouri, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:
 - (a) Constructively discharging, and refusing to reinstate employees because they have engaged in union activities or actively supported a union or engaged in protected concerted activities.
 - (b) Requesting employees to surveil employees' work performances with the unlawful intent of using any reported deficiencies as a pretext for discipline, because of their union or protected concerted activities.
 - (c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them in Section 7 of the Act.
2. Take the following affirmative action designed to effectuate the policies of the Act:
 - (a) Offer to Esther Fox, immediate and full reinstatement to her former job and work schedule or, if that job no longer exists because of valid reasons, to a substantially equivalent position without prejudice to her seniority or other rights and privileges and make her whole for her loss of earnings in the manner set forth in the section of this Decision entitled "The Remedy."
 - (b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to effectuate the reinstatement and backpay provisions of this recommended Order.
 - (c) Post at its facilities in Campbell, Missouri, copies of the attached notice marked "Appendix."⁶ Copies of said notice, on forms provided by the Regional Director for Region 14, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered with any other material.
 - (d) Notify the Regional Director for Region 14, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

⁵ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

⁶ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

⁴ See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).